

108TH CONGRESS  
1ST SESSION

# S. 1797

To implement antitrust enforcement enhancements and cooperation incentives.

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IN THE SENATE OF THE UNITED STATES

OCTOBER 29, 2003

Mr. DEWINE (for himself and Mr. KOHL) introduced the following bill; which  
was read twice and referred to the Committee on the Judiciary

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## A BILL

To implement antitrust enforcement enhancements and  
cooperation incentives.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Antitrust Criminal  
5 Penalty Enhancement and Reform Act of 2003”.

6 **TITLE I—ANTITRUST ENFORCE-**  
7 **MENT ENHANCEMENTS AND**  
8 **COOPERATION INCENTIVES**

9 **SEC. 101. SUNSET.**

10 (a) IN GENERAL.—Except as provided in subsection

11 (b), the provisions of sections 101 through 104 shall cease

1 to have effect 5 years after the date of enactment of this  
2 Act.

3 (b) EXCEPTION.—With respect to an applicant who  
4 has entered into an antitrust leniency agreement on or be-  
5 fore the date on which the provisions of sections 101  
6 through 104 of this title shall cease to have effect, the  
7 provisions of sections 101 through 104 of this title shall  
8 continue in effect.

9 **SEC. 102. DEFINITIONS.**

10 In this title:

11 (1) ANTITRUST DIVISION.—The term “Anti-  
12 trust Division” means the United States Depart-  
13 ment of Justice Antitrust Division.

14 (2) ANTITRUST LENIENCY AGREEMENT.—The  
15 term “antitrust leniency agreement,” or “agree-  
16 ment,” means a leniency letter agreement, whether  
17 conditional or final, between a person and the Anti-  
18 trust Division pursuant to the Corporate Leniency  
19 Policy of the Antitrust Division in effect on the date  
20 of execution of the agreement.

21 (3) ANTITRUST LENIENCY APPLICANT.—The  
22 term “antitrust leniency applicant,” or “applicant,”  
23 means, with respect to an antitrust leniency agree-  
24 ment, the person that has entered into the agree-  
25 ment.

1           (4) CLAIMANT.—The term “claimant” means a  
 2           person or class, that has brought, or on whose behalf  
 3           has been brought, a civil action described in section  
 4           104(1), except that the term does not include a  
 5           State or a subdivision of a State with respect to a  
 6           civil action brought to recover damages sustained by  
 7           the State or subdivision.

8           (5) COOPERATING INDIVIDUAL.—The term “co-  
 9           operating individual” means, with respect to an anti-  
 10          trust leniency agreement, a current or former direc-  
 11          tor, officer, or employee of the antitrust leniency ap-  
 12          plicant who is covered by the agreement.

13          (6) PERSON.—The term “person” has the  
 14          meaning given it in subsection (a) of the first section  
 15          of the Clayton Act.

16 **SEC. 103. LIMITATION ON RECOVERY.**

17          (a) IN GENERAL.—Subject to subsection (d), in any  
 18          civil action alleging a violation of section 1 or 3 of the  
 19          Sherman Act, or alleging a violation of any similar State  
 20          law, based on conduct covered by a currently effective  
 21          antitrust leniency agreement, the amount of damages re-  
 22          covered by or on behalf of a claimant from an antitrust  
 23          leniency applicant who satisfies the requirements of sub-  
 24          section (b), together with the amounts so recovered from  
 25          cooperating individuals who satisfy such requirements,

1 shall not exceed that portion of the actual damages sus-  
2 tained by such claimant which is attributable to the com-  
3 merce done by the applicant in the goods or services af-  
4 fected by the violation.

5 (b) REQUIREMENTS.—Subject to subsection (c), an  
6 antitrust leniency applicant or cooperating individual sat-  
7 isfies the requirements of this subsection with respect to  
8 a civil action described in subsection (a) if the court in  
9 which the civil action is brought determines that the appli-  
10 cant or cooperating individual, as the case may be, has  
11 provided satisfactory cooperation to the claimant with re-  
12 spect to the civil action, which cooperation shall include—

13 (1) providing a full account to the claimant of  
14 all facts known to the applicant or cooperating indi-  
15 vidual, as the case may be, that are potentially rel-  
16 evant to the civil action;

17 (2) furnishing all documents or other items po-  
18 tentially relevant to the civil action that are in the  
19 possession, custody, or control of the applicant or co-  
20 operating individual, as the case may be, wherever  
21 they are located; and

22 (3)(A) in the case of a cooperating individual—

23 (i) making himself or herself available for  
24 such interviews, depositions, or testimony in

1 connection with the civil action as the claimant  
2 may reasonably require; and

3 (ii) responding completely and truthfully,  
4 without making any attempt either falsely to  
5 protect or falsely to implicate any person or en-  
6 tity, and without intentionally withholding any  
7 potentially relevant information, to all questions  
8 asked by the claimant in interviews, depositions,  
9 trials, or any other court proceedings in connec-  
10 tion with the civil action; or

11 (B) in the case of an antitrust leniency appli-  
12 cant, using its best efforts to secure and facilitate  
13 from cooperating individuals covered by the agree-  
14 ment the cooperation described in paragraphs (1)  
15 and (2) and subparagraph (A).

16 (c) TIMELINES.—If the initial contact by the anti-  
17 trust leniency applicant with the Antitrust Division re-  
18 garding conduct covered by the antitrust leniency agree-  
19 ment occurs after a civil action described in subsection (a)  
20 has been filed, then the court shall consider, in making  
21 the determination concerning satisfactory cooperation de-  
22 scribed in subsection (b), the timeliness of the applicant's  
23 initial cooperation with the claimant.

24 (d) CONTINUATION.—Nothing in this section shall be  
25 construed to modify, impair, or supersede the provisions

1 of sections 4, 4A, and 4C of the Clayton Act relating to  
 2 the recovery of costs of suit, including a reasonable attor-  
 3 ney's fee, and interest on damages, to the extent that such  
 4 recovery is authorized by such sections.

5 **SEC. 104. RIGHTS AND AUTHORITY OF ANTITRUST DIVI-**  
 6 **SION NOT AFFECTED.**

7 Nothing in this title shall be construed to—

8 (1) affect the rights of the Antitrust Division to  
 9 seek a stay or protective order in a civil action based  
 10 on conduct covered by an antitrust leniency agree-  
 11 ment to prevent the cooperation described in section  
 12 103(b) from impairing or impeding the investigation  
 13 or prosecution by the Antitrust Division of conduct  
 14 covered by the agreement; or

15 (2) create any right to challenge any decision  
 16 by the Antitrust Division with respect to an anti-  
 17 trust leniency agreement.

18 **SEC. 105. INCREASED PENALTIES FOR ANTITRUST VIOLA-**  
 19 **TIONS.**

20 (a) RESTRAINT OF TRADE AMONG THE STATES.—

21 Section 1 of the Sherman Act (15 U.S.C. 1) is amended  
 22 by—

23 (1) striking “\$10,000,000” and inserting  
 24 “\$100,000,000”;

1           (2) striking “\$350,000” and inserting  
2           “\$1,000,000”; and

3           (3) striking “three” and inserting “10”.

4           (b) MONOPOLIZING TRADE.—Section 2 of the Sher-  
5 man Act (15 U.S.C. 2) is amended by—

6           (1) striking “\$10,000,000” and inserting  
7           “\$100,000,000”;

8           (2) striking “\$350,000” and inserting  
9           “\$1,000,000”; and

10          (3) striking “three” and inserting “10”.

11          (c) OTHER RESTRAINTS OF TRADE.—Section 3 of  
12 the Sherman Act (15 U.S.C. 3) is amended by—

13          (1) striking “\$10,000,000” and inserting  
14          “\$100,000,000”;

15          (2) striking “\$350,000” and inserting  
16          “\$1,000,000”; and

17          (3) striking “three” and inserting “10”.

18          (d) SENTENCING GUIDELINE FOR ANTITRUST OF-  
19 FENSES.—The Guidelines Manual promulgated by the  
20 Sentencing Commission pursuant to section 994(a) of title  
21 28, United States Code, is amended as follows:

22           (1) Section 2R1.1(a) is amended by striking  
23           “10” and inserting “14”.

24           (2) The volume of commerce table in section  
25           2R1.1(b)(2) is amended to read as follows:

1           “(2) If the volume of commerce attributable to  
 2           the defendant was more than \$5,000,000, adjust the  
 3           offense level as follows:

<b>“Volume of Commerce (Apply the Greatest):</b>	<b>Adjustment to Offense Level:</b>
More than \$5,000,000 .....	add 1
More than \$10,000,000 .....	add 2
More than \$20,000,000 .....	add 4
More than \$40,000,000 .....	add 6
More than \$80,000,000 .....	add 8
More than \$160,000,000 .....	add 10
More than \$320,000,000 .....	add 12
More than \$640,000,000 .....	add 14
More than \$1,000,000,000 .....	add 16.”.

4           (3) Section 2R1.1(c)(1) is amended by striking  
 5           “\$20,000” and inserting “\$50,000”.

## 6   **TITLE II—TUNNEY ACT REFORM**

### 7   **SEC. 201. PUBLIC INTEREST DETERMINATION.**

8           Section 5 of the Clayton Act (15 U.S.C. 16) is  
 9           amended—

10           (1) in subsection (d), by inserting at the end  
 11           the following: “Upon application by the United  
 12           States, the district court may, for good cause (based  
 13           on a finding that the expense of publication in the  
 14           Federal Register exceeds the public interest benefits  
 15           to be gained from such publication), authorize an al-  
 16           ternative method of public dissemination of the pub-  
 17           lic comments received and the response to those  
 18           comments.”; and

19           (2) in subsection (e)—

1 (A) in the matter before paragraph (1),  
2 by—

3 (i) inserting “independently” after  
4 “shall”;

5 (ii) striking “court may” and insert-  
6 ing “court shall”; and

7 (iii) inserting “(1)” before “Before”;  
8 and

9 (B) striking paragraphs (1) and (2) and  
10 inserting the following:

11 “(A) the competitive impact of such judgment,  
12 including termination of alleged violations, provisions  
13 for enforcement and modification, duration of relief  
14 sought, anticipated effects of alternative remedies  
15 actually considered, whether its terms are ambiguous  
16 and any other competitive considerations bearing  
17 upon the adequacy of such judgment necessary to a  
18 determination of whether the consent judgment is in  
19 the public interest; and

20 “(B) the impact of entry of such judgment  
21 upon competition in the relevant market or markets,  
22 upon the public generally and individuals alleging  
23 specific injury from the violations set forth in the  
24 complaint including consideration of the public ben-

1       efit, if any, to be derived from a determination of  
2       the issues at trial.

3       “(2) The Court shall not enter any consent judgment  
4 proposed by the United States under this section unless  
5 it finds that there is reasonable belief, based on substan-  
6 tial evidence and reasoned analysis, to support the United  
7 States’ conclusion that the consent judgment is in the pub-  
8 lic interest. In making its determination as to whether  
9 entry of the consent judgment is in the public interest,  
10 the Court shall not be limited to examining only the fac-  
11 tors set forth in this subsection, but may consider any  
12 other factor relevant to the competitive impact of the judg-  
13 ment.”.

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